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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10

11 UNITED STATES OF AMERICA,

No. 3:14-cr-00102-CRB

12 Plaintiff,

**ORDER DENYING BAIL PENDING
APPEAL**

13 v.

14 EDMOND ROBLES,

15 Defendant.
16 _____/

17 Now pending before the Court is Edmond Robles's motion for bail pending appeal.
18 Mot. Bail (dkt. 284). Under the Bail Reform Act of 1984, a "judicial officer shall order that
19 a person who has been found guilty of an offense and sentenced to a term of imprisonment,
20 and who has filed an appeal . . . be detained, unless the judicial officer finds – (A) by clear
21 and convincing evidence that the person is not likely to flee or pose a danger to the safety of
22 any other person in the community if released . . .; and (B) that the appeal is not for the
23 purpose of delay and raises a substantial question of law or fact likely to result in" reversal, a
24 new trial, a sentence that does not include imprisonment, or a reduced sentence to a term of
25 imprisonment less than the time already served plus the time expected for the duration of the
26 appeal. 18 U.S.C. § 3143(b)(1). With respect to the latter requirement, the Court must
27 resolve two questions: (1) whether the appellate issues raised by the defendant are
28 "substantial" and (2) whether those issues are "likely to result in reversal." United States v.

1 Handy, 761 F.2d 1279, 1280–81 (9th Cir. 1985). A “substantial question” is one that is
 2 “fairly debatable” or “fairly doubtful.” Id. at 1283 (quotations omitted). The burden is on
 3 Robles to overcome the presumption that he should be detained while his appeal is pending.
 4 See United States v. Montoya, 908 F.2d 450, 451 (9th Cir. 1990) (“As the moving party, it is
 5 [the defendant’s] burden” to “raise[] a ‘fairly debatable’ issue on appeal.”).

6 The Government agrees with Robles’s representation that he is not a danger to the
 7 community, notwithstanding evidence that in December 2014 (after his conviction for the
 8 instant offense) Robles was ordered confined to his home for making threatening phone calls
 9 to a man that had begun dating a woman whom Robles previously dated. Otherwise, Robles
 10 appears to have strong ties to his children and an honorable record of military service. The
 11 Court declines to reach the question whether Robles is a danger to the community or a flight
 12 risk because Robles is, in any event, not entitled to bail under the second prong of the statute.

13 Robles’s appeal fails to raise any substantial question of law or fact likely to result in
 14 reversal, a new trial, or a reduced sentence. See 18 U.S.C. § 3143(b)(1); Handy, 761 F.2d
 15 1280–81 (9th Cir. 1985). Both of Robles’s arguments on appeal relate to a note addressed to
 16 the Court by a juror after the testimony of witness Bernadette Melvin. Melvin had testified
 17 that Robles had given her a new iPod during a period in which she had a romantic
 18 relationship with him. Other evidence showed that Robles and Reynaldo Vargas purchased
 19 that iPod with an Apple gift card that was taken during a search. In its entirety, the note from
 20 the juror stated as follows:

21 To Whom It May Concern:

22 I just wanted to inform the Court that I have met one of the witnesses (prior to jury
 23 selection). I do not know Ms. Melvin personally, but I have met her once or twice in
 the past. Regards, [signature].

24 Dkt. 264-1 at 3. After the jury had been excused for the day and in open court with Robles
 25 present, the Court provided the note to counsel. Both defense counsel for Robles and the
 26 Government deferred to the Court’s judgment about whether the juror should be questioned
 27 regarding the note, and defense counsel did not ask that the juror be questioned. The Court
 28 decided not to question the juror.

1 First, Robles argues that he is likely to prevail on appeal by showing that this Court
2 abused its discretion by declining to question the juror about the substance of the note,
3 despite defense counsel not requesting that the juror be questioned. There is no support for
4 Robles's position. The case on which Robles relies, Bell v. Uribe, 748 F.3d 857, 859–62
5 (9th Cir. 2013), involved a juror who was removed from the jury for violating the court's
6 instructions by doing independent research to put together a presentation for her fellow jurors
7 about what she believed to be the defendant's mental health conditions. The Ninth Circuit
8 provided a parenthetical citation to Dyer v. Calderon, 151 F.3d 974–75 (9th Cir. 1998) for
9 the proposition that "upon being alerted to potential juror misconduct, the trial court "must
10 undertake an investigation of the relevant facts and circumstances" and the investigation
11 must "be reasonably calculated to resolve the doubts raised about the juror's impartiality."
12 Bell, 748 F.3d at 867. But there is no allegation of juror misconduct here, potential or real.
13 And although Robles provides no support for his suggestion that further questioning is
14 required when there is a "potential for extraneous influence," even that potential does not
15 exist here, where the juror affirmatively stated that he did "not know Ms. Melvin personally."
16 Robles is unlikely to be able to show that this Court "abuse[d] its discretion [by] reach[ing] a
17 result that is 'illogical, implausible, or without support in inferences that may be drawn from
18 facts in the record'" on this issue, and thus does not raise a "substantial question" that is
19 "likely to result in reversal on appeal." See United States v. Montes, 628 F.3d 1183, 1187
20 (9th Cir. 2011) (quotations omitted).

21 Robles's second argument on appeal is so frivolous as to border on the nonsensical.
22 Robles argues that his right under Federal Rule of Criminal Procedure 43 and the Fifth
23 Amendment to be present at all trial proceedings was violated because he was not positioned
24 within the courtroom to look at the note and his attorney apparently did not physically show
25 it to him. All parties agree that the note was displayed and its substance discussed in open
26 court, not at sidebar, with Robles physically present and able to see and hear all proceedings.
27 See Mot. Bail at 10–11; Gov't Opp'n (dkt. 290) at 4. There is no authority or reasonable
28 argument for Robles's suggestion that his right to be present required anything more, or that

1 the Court had any responsibility to ensure that Robles actually read every exhibit admitted
 2 into evidence. In fact, the Supreme Court's decision in United States v. Gagnon, 470 U.S.
 3 522, 526 (1985) forecloses Robles's arguments. Gagnon involved a district court's in camera
 4 interview, with defense counsel but not the defendant present, of a juror who had expressed
 5 concern about the defendant's behavior during the trial. Id. at 523–24. A transcript of the
 6 interview was made available to all of the parties, none of whom made any request contrary
 7 to the district court's actions. Id. at 524. The Supreme Court held that the defendants' Fifth
 8 Amendment rights were not violated because the defendants' presence at that "short interlude
 9 in a complex trial" was "not required to ensure fundamental fairness or a reasonably
 10 substantial opportunity to defend against the charge." Id. at 527 (quotation omitted). As to
 11 Rule 43 (assuming without deciding that it even applied), defendants had waived those rights
 12 by "not request[ing] to attend the conference [with the juror] at any time." Id. at 527–28.

13 In light of Gagnon, it is baseless to suggest that Robles's right were violated here,
 14 where there was not even an in camera proceeding—rather, all discussion of the juror's note
 15 was done in open court, with Robles present. Nothing precluded Robles from raising any
 16 comments he might have had about the note (though he identifies none) with his attorney, or
 17 otherwise participating in any way he wished. Moreover, the record shows that the substance
 18 of the note was trivial, as the juror stated in his note and at voir dire he did not know Ms.
 19 Melvin, nor Robles, nor anything else that bears on the trial.

20 Robles having failed to raise any meritorious claims of error that warrant review, the
 21 Court doubts that the appeal is not for the purpose of delay. See 18 U.S.C. § 3143(b)(1)(B).
 22 The Court also is unable to find that Robles's appeal raises a substantial question of law or
 23 fact likely to result in" reversal, a new trial, or a reduced sentence. See 18 U.S.C.
 24 § 3143(b)(1). Accordingly, Robles's motion for bail pending appeal is DENIED.

25 **IT IS SO ORDERED.**

26 Dated: April 27, 2015

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 28 CHARLES R. BREYER
 UNITED STATES DISTRICT JUDGE